

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Isleboro and Winter Harbor, Maine)

) MM Docket No. 93-203

)

) RM-8245

) RM-8340

)

)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MOTION FOR STAY

Christopher DiPaola ("DiPaola"), by and through counsel, and pursuant to §1.429(k) of the Commission's Rules (47 C.F.R. §1.429(k)), hereby submits his "Motion For Stay" of the effectiveness of the Order, DA 94-1270, released November 23, 1994 ("Order"), in the above-captioned rulemaking proceeding. In support whereof, the following is shown:

Background

1. On December 30, 1993, the Commission issued a Report and Order, DA 93-1495, in MM Docket No. 93-203 ("Report and Order"), wherein they allotted a new FM station on Channel 288B1 to Isleboro, Maine. In the Report and Order, the Commission opened a window for the filing of applications beginning on February 15, 1994, and ending on March 17, 1994.

2. On February 25, 1994, the Commission issued a Public Notice, FCC 94-41 ("February 25th Public Notice"), "holding in abeyance the processing of applications and the adjudication of hearing proceedings involving mutually exclusive proposals for

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new broadcast facilities in light of the opinion of the United States Court of Appeals for the District of Columbia in Bechtel v. FCC, 10 F. 3d 875 (D.C. Cir. 1993)." The Commission stated that, since the Court had invalidated its method for selecting between mutually exclusive broadcast applications, it was freezing all broadcast hearings and the processing of applications for new stations. The Commission added that "...during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities.... [A]ny such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze." The February 25th Public Notice did not specifically state whether window filing periods that had been opened prior to the imposition of the freeze but that had yet to close were to be suspended or that such windows would remain open. In addition, the February 25th Public Notice was never published in the Federal Register.

3. Shortly after the release of the February 25th Public Notice, both undersigned counsel and another communications counsel sought a declaratory ruling from the Commission on the issue of whether open window filing periods had been cancelled or postponed. See Exhibits A and B. Lauren Colby, Esq., a communications attorney, filed an "Emergency Petition For Declaratory Ruling" on March 2, 1994.¹ Mr. Colby sought a ruling from the Commission as to whether open windows were still valid or had been cancelled or postponed. In his Emergency Petition, Mr. Colby related that:

A sharp debate has arisen amongst communications counsel concerning the meaning of the [February 25th Public Notice]...There is...broad confusion concerning the meaning of the word 'suspended' as

¹ Smithwick & Belendiuk, P.C. filed "Comments In Support of Emergency Petition For Declaratory Ruling" on March 2, 1994, raising other questions left unresolved by the Commission's February 25th Public Notice. See Exhibit B.

applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms 'canceled' or 'postponed' do not appear in the official announcement).

Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

Exhibit A at p. 2.

4. Mr. Colby stated further that: "It is urgent that this matter be clarified" and that "[I]ssuance of a ruling will be beneficial...to a considerable number of persons, who have commissioned the preparation of applications which were to be filed under the windows currently announced, and who have no idea whether to proceed with these applications, or not." Exhibit A. The Commission never acted on Mr. Colby's request or sought to clarify these important matters.

5. On April 11, 1994, Mr. DiPaola filed an application for the new Isleboro FM station which is currently pending in the Mass Media Bureau FM processing line.

6. In the above-referenced November 23rd Order, the Commission stated that it had stayed the previous Isleboro window filing and, as such, it was now opening a new 30 day window. Simultaneous with the filing of this Motion, Mr. DiPaola is filing a Petition For Reconsideration requesting that the Commission rescinded its November 23rd Order. Mr. DiPaola argues that the February 25th Public Notice failed to provide adequate notice that the Commission intended to suspended all window filing periods, including those that had previously been opened. Mr. DiPaola

notes that communications counsel formally sought a clarification from the Commission on this point but never received one. In addition, Mr. DiPaola also points out that the February 25th Public Notice which suspended procedural rules, should have been published in the Federal Register. The Commission's failure to make such publication means that the February 25th Public Notice failed to suspend the previous Isleboro window filing - a result the Commission cannot now reverse by subsequent action. Mr. DiPaola now seeks to stay the opening of the new Isleboro window.

The Commission's Four Part Test

7. Under §1.429(k) of the rules, "...upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. §1.429(k). When considering whether a party has shown "good cause," to support a request for stay, the Commission makes the following four-part analysis:

- (1) The likelihood of irreparable injury to the petitioner in the absence of relief.
- (2) The injury to other parties in the proceeding that might follow if relief is granted.
- (3) The injury to the public interest that might result if the petition is granted.
- (4) The likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal.

See, Storer Communications, Inc., 101 FCC 2d 434 (1985); WAMTC v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921 (D.C. Cir. 1958).

Likelihood of Injury To DiPaola

8. DiPaola is an applicant for the new FM station at Isleboro, Ohio. Without a stay of the November 23rd Order, the Commission will accept additional applications for the new Isleboro station, applications that may be returned later should the Commission grant Mr. DiPaola's Petition For Reconsideration and rescind its previous Order. Meanwhile, Mr. DiPaola will be forced to expend time and energy challenging the merits of these additional applications. Such a challenge may ultimately include the additional applicants participation in a comparative proceeding, where Mr. DiPaola may be forced to spend countless hours challenging an application that should have otherwise not have been accepted for filing. In this case, the harm to DiPaola is "both certain and great" and not simply "theoretical." Wisconsin Gas v. FERC, 758 F. 2d 669 (D.C. Cir. 1985)(per curiam). Staying the effectiveness of the Order will permit DiPaola to challenge the Commission's decision while avoiding the unnecessary burden of defending against additional filers.

Injuries To Other Parties If Relief Is Granted

9. If the Commission's Order is stayed, no harm will come to the other parties in this proceeding. Since Mr. DiPaola is the only applicant for the new Isleboro station, there are effectively no other parties to this proceeding.

Injury To Public Interest

10. No injury to the public interest will result if DiPaola's Motion is granted. Outside parties desiring to file applications for Isleboro in a new window filing period will simply have to await the Commission's decision on Mr. DiPaola's Petition For Reconsideration before going forward. In fact, such outside parties would actually

benefit from such a delay, for a decision on Mr. DiPaola's Petition will provide them with guidance as to whether a second window filing period was justified and eliminate the risk that filing applications at this time may entail. Therefore, as DiPaola has shown, no harm will come to the general public if his Motion is granted.

Likelihood of Success of DiPaola's Petition

11. In his Petition, DiPaola demonstrates conclusively that the Commission's February 25th Public Notice failed to give adequate notice that the Isleboro window filing was stayed. Furthermore, no formal notice was provided by publishing the Public Notice in the Federal Register. Without such notice, the window period passed and as such the Commission cannot correct this fact by opening a second window filing period. In fact, such a second window is not necessary, since the Commission now has an applicant for these facilities. DiPaola is confident that, upon further examination, the Commission will reconsider its November 23rd Order and rescinded its second window filing period for Isleboro, Maine.

Conclusion

12. DiPaola has met each of the Commission's four tests to support a Motion For Stay. By staying its Order, the Commission will avoid the problems that may arise if additional parties file applications for Isleboro only to have their applications returned later when the Commission grants Mr. DiPaola's Petition and reverses course. No harm will result and a stay will permit DiPaola the opportunity to properly challenge the Commission's actions in this case.

WHEREFORE, the above-facts considered, Christopher DiPaola, hereby respectfully requests that the Commission **STAY** the effectiveness of its Order, DA

94-1270, released November 23, 1994, pending the outcome of DiPaola's Petition For Reconsideration in this proceeding.

Respectfully submitted,

CHRISTOPHER DIPAOLA

By: 

Arthur V. Belendiuk
Shaun A. Maher

His Attorneys

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December 5, 1994

EXHIBIT A

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
FREEZE ON COMPARATIVE HEARINGS) FCC 94-41
)
TO: General Counsel)
)

EMERGENCY PETITION FOR DECLARATORY RULING

Lauren A. Colby, attorney at law, on behalf of certain clients,¹ hereby respectfully requests the General Counsel to immediately issue a declaratory ruling clarifying certain aspects of the freeze on comparative hearings announced on February 25, 1994, (FCC 94-41). In support thereof, it is alleged:

1. On February 25, 1994, the Commission announced a freeze on comparative hearings. At page 2 of the announcement, the following language appears:

"Further, during the freeze, the Mass Media Bureau will not issue cutoff lists or adopt FM filing windows for new filing opportunities or require the filing of amendments, integration proposals, or hearing fees. . . Any such cutoff lists or orders adopted prior to the imposition of this freeze will be suspended for the period of the freeze".

¹It would be inappropriate to identify the clients on whose behalf this petition is being filed, because it would reveal client confidences, i.e., the intention of certain clients to file applications within the window periods which have been announced by the FCC.

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2. A sharp debate has arisen amongst communications counsel concerning the meaning of the above quoted provisions. Most counsel agree that the Commission did not intend to prevent the filing of applications which are in conflict with a renewal application, because the Commission apparently would have no legal authority to do so. Similarly, it would appear that, where a "first come, first served" FM window is open, the freeze would not be applicable, because anyone filing for that window would presumably face no comparative hearing. There is, however, broad confusion concerning the meaning of the word "suspended" as applied to FM windows which have already been announced. Some attorneys contend that applications will be accepted for those windows which have already been announced, but the processing of those applications will be suspended until the freeze lifts. Other attorneys believe that the Commission will not accept any application filed during the currently announced windows, because those windows have somehow been canceled or postponed (although the terms "canceled" or "postponed" do not appear in the official announcement).

3. Members of the FCC staff have given conflicting opinions. Responsible staff members have supported both the view that the Commission will continue to accept applications for windows already announced, and the other point of view that the Commission will reject any such applications.

4. All of this puts the communications bar in a very difficult situation. If we advise clients that all of the pending

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windows have been closed; tell a client not to file an application; and someone else files an application which is accepted, we will have given bad advice. If, on the other hand, we tell a client to file an application and the Commission returns the application and keeps the filing fee, we will have given very bad advice.

5. It is urgent that this matter be clarified. Furthermore, because there are at least two FM windows which are currently open and will be closing within 14 days, it is urgent that the matter be clarified in writing just as soon as possible.

6. The undersigned respectfully requests the General Counsel to issue a further ruling, clarifying these matters. If the General Counsel is unable to do so without consulting with the full Commission, the undersigned respectfully requests that such consultation take place, so that a ruling may be issued. Issuance of a ruling will be beneficial, not only to the communications bar, but also to a considerable number of persons, who have commissioned the preparation of applications which were to be filed under the windows currently announced, and who have no idea whether to proceed with those applications, or not.

Respectfully submitted,

March 2, 1994

LAUREN A. COLBY

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By:

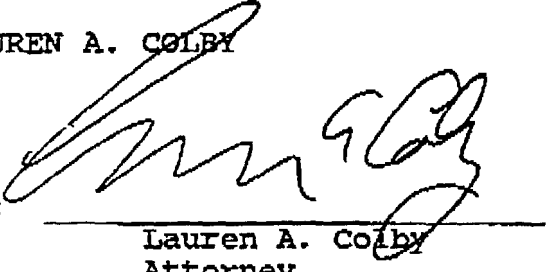

Lauren A. Colby
Attorney

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

On the Matter of)
)
FREEZE ON COMPARATIVE HEARINGS) FCC 94-41
)
TO: General Counsel

**COMMENTS IN SUPPORT OF EMERGENCY PETITION FOR
DECLARATORY RULING**

The law firm of Smithwick & Belendiuk, P.C. ("S&B") hereby respectfully submits its comments in support of the "Emergency Petition For Declaratory Ruling," filed by Lauren A. Colby, Esq., on March 2, 1994. In support whereof, the following is shown:

1. Mr. Colby's Petition addresses important issues concerning the Commission's recent "freeze" on comparative hearings and the filing of applications for new FM stations, as outlined in its Public Notice, FCC 94-41, released February 25, 1994. S&B also represents numerous clients that will be affected by the Commission's action. S&B supports Mr. Colby's Petition and hopes that the Commission will take this opportunity to more clearly explain its proposed freeze and what proceedings and/or filings it will affect.

2. In addition, S&B believes that there are two other areas that the Commission's Public Notice did not clearly address. First, in one paragraph of the Public Notice, the Commission states that "...hearing proceedings (except those aspects of hearing proceedings not involving comparative analysis of new applicant's proposals) will be suspended." Public Notice at p. 1 (emphasis added). This would

appear to say that parties in a comparative hearing are free to pursue basic qualifying issues against other applicants and that such issues may continue to be litigated. In fact, the Commission states that, where an issue has been added or a case remanded on a basic issue, the proceeding will be permitted to go forward. Public Notice at p. 2. However, the Public Notice does not address the situation where a qualifying issue was not added or requested prior to February 25, 1994. The question remains whether, during the freeze, parties are required to file Motions To Enlarge Issues based upon "newly-discovered evidence" within the 15 day deadline specified in §1.229(c) of the rules or whether such deadlines have been stayed until the freeze is lifted. Additionally, the Public Notice does not address whether a party who is the subject of a Motion To Enlarge raising basic qualifying issues that was filed before the Commission's freezes, is required to submit its Opposition and the Movants Reply by the deadline outlined in §1.294 of the rules, or whether such deadlines are also stayed.

3. In addition, the Commission's Public Notice states that during the freeze the Mass Media Bureau will not "issue cutoff lists or...require the filing of....hearing fees." Public Notice at p. 2. However, the Public Notice does not explain whether those parties with applications that appeared on a cutoff list issued before the freeze who are facing an upcoming hearing fee payment deadline are required to make the hearing fee payment or whether the freeze has stayed this requirement.

4. Should the Commission choose to consider Mr. Colby's Petition, S&B believes it should also quickly address these other important questions.

WHEREFORE, the above-premises considered, the law firm of Smithwick & Belendiuk, P.C., hereby respectfully requests that the Commission issue a Declaratory Ruling concerning its Public Notice, FCC 94-41, as outlined herein.

Respectfully submitted,

SMITHWICK & BELENDIUK, P.C.



By: _____

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March 2, 1994

PN/GSS/FREEZE.COM

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 2nd day of March, 1994, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

Lauren A. Colby, Esq.
10 E. Fourth Street
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Patricia A. Neil